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SUPREME COURT, U.S.

IN THE

UNITED STATES SUPREME COURT

80-6451

WRIT OF CERTIORARI

WILLIE JAMES GIBSON, PETITIONER.

VERSUS

FRANK C. BLACKBURN, WARDEN, RESPONDENT.

DRAFTED BY:

WILLIE JAMES GIBSON

#80839 SPRUCE 2

LOUISIANA STATE PENITENTIARY

ANGOLA, LOUISIANA 70712

WILLIE JAMES GIBSON

versus

FRANK C. BLACKBURN

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IN THE

UNITED STATES SUPREME COURT

WILLIE JAMES GIDEON, PETITIONER

VERSUS No._____

FRANK C. BLACKBURN, WARDEN, RESPONDENT.

PETITION OF CERTIORARI FOR REVIEW OF

THE INFERIOR COURTS DECISIONS:

JURISDICTION:

On Jan. 30, 1981, order was issued denying Petitioner's motion for a Certificate of Probable Cause and a motion for Leave to Appeal in Forma Pauperis were denied and now Petitioner's claims are presented for review. The petition for certiorari is filed within ninety (90) days of the date the United States Court of Appeals denied Petitioner's motions. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1) and Rule 22 (2) of the rules of the Supreme Court of the United States.

CONSTITUTIONAL ISSUES AND QUESTIONS:

1.) Did the State prove it's case beyond a reasonable doubt that a rational trier of factor could have found Petitioner guilty and was every element of the crime proven using the "reasonable doubt standard?'

2.) Did the circumstances of the Unconstitutional pretrial line-up create taintness and suggestion and thereby prejudicing the mind of the victim against Petitioner, and if suggestion employed, was it harmless error?

3.) Did Petitioner's trial counsel allow the minds of the jury to be prejudiced against him counsel 1.) Did not object to the evidence tendered against Petitioner, and 2.) Counsel did not question the victim-witness thoroughly to find out what,if anything, was there about Petitioner's mouth that made her positive Petitioner was the man that robbed her? And further, did counsel render reasonably effective assistance when counsel 1.) Filed no pretrial motion to suppress the identification testimony, which was the strenght of the States case against Petitioner, 2.) Counsel did not file a pretrial motin to suppress the evidence or a motion to quash, 3.) Counsel did not secure all of Petitioner's alibi witnesses, 4.) Counsel did not bring it to the jury's attention that Petitioner's witnesses could only have seen and talked with Petitioner on either Jan. 15 or Jan. 16 1975 because prior to that time Petitioner was a prisoner at the Monroe City Jail for approximately two (2) months, and 5.) Counsel failed to present two (2) other alibi witnesses for the Honorable Judge to weigh their testimony at a motion for a new trial, and if counsel's neglect did create prejudice thereby, was it harmless?

STATUTORY PROVISIONS CITED:

U.S.C. Art. IV Sect. 1. provides that;

All born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and in the State wherein they reside. No State shall make

or enforce any law which shall abridge the privileges or immities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property without due process of law. Nor deny to any person in it's jurisdiction equal protection of the law.

As far back as the Anglo American era, it was said "it was better to let the guilty go free than to convict the innocent.

STATEMENT OF THE CASE:

On Jan. 16, 1975, Petitioner, Willie James Gibson, was arrested for escape from the Monroe City Jail. An armed robbery occurred on Jan. 15, 1975 and on Feb. 6, 1975 the District Attorney's office filed a bill of information charging Petitioner. Petitioner was arraigned and appointed counsel on or around Feb. 6, 1975 and on March 6, 1975 Petitioner was tried, by jury, and convicted of armed robbery. Consequently, on April 24, 1975 Petitioner was sentenced to a term of fifteen years, at hard labor, to the custody of the Department of Corrections, Angola, Louisiana 70712. Appeal was taken to the Louisiana Supreme Court and on Jan. 2, 1976 the appeal was denied. see State v. Gibson, La. 323 So. 446.

Application for habeas action was filed into the trial court on or around July 3, 1978 and on August 18, 1978 a hearing was granted and the writ was denied. Petitioner's newly appointed counsel filed an appeal from the denial of the writ and on Dec. 15, 1978 the appeal was denied.

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On Dec. 14, 1979 Petitioner went on to file an application for habeas action into the United States District Court, for the Western District, alledging his same three (3) claims. On Nov. 10, 1980 Petitioner's habeas action was denied. Consequently, Petitioner filed a notice of appeal, forma pauperis, and a motion for an issuance of a certificate of probable cause into the U.S. District Court and on Dec. 11, 1980 Petitioner was denied. Following, Petitioner filed same in the United States Court of Appeals, for the Fifth Circuit and on Jan. 30, 1981 Petitioner's motions were again denied.

STATEMENT OF THE FACTS:

On Jan. 15, 1975 the Monroe City Police Department receive a complaint of an armed robbery at the Seven-Eleven Food Store at South Second and Winnsboro Road, Monroe, Louisiana. The attendant, Mrs. Griffin, informed the police that a black male wearing maroon pants, white knit shirt, and black and white tennis shoes came into the store at approximately 10:20 p.m. and robbed her of sixty-four ($64.00) dollars. The victim stated that she was filling out her daily report when a man came in and went to the magazine rack and stayed there for a while. And that two (2) other customers came in behind him. One of them went to the magazine rack also and the other made a purchase. The other two (2) left and the first man stayed. The victim stated that the man then went to the cooler and started to look over the sanwiches, and that she went to the cooler to get a drink and the man was bending over looking on the bottom sheves, so she went back to the counter and continued to fill out her report. The victim stated that she thought the man had left because she thought she heard the door open. She stated that she

felt someone behind her and when she turned the man was right in her face. The victim stated that the man hit her with a slapper (16 in. layer of stitched lather) that she was hit across the left eye and nose and she fell to the floor. The victim stated that the man could not open the cashregister and he made her get up and open it.

Mrs. Griffin was hopitalized for broken nose and injury to her left eye and as soon as her eye healed sufficiently she was shown some photographs and she picked Petitioner as the man that robbed her.

THE FACTS OF THIS CASE CAN BEST BE EXPLAINED AS FOLLOWS:

On Jan. 16, 1975 Petitioner, prior to being incarcerated for two (2) months, was apprehended for escape and questioned about the armed robbery of a Seven Eleven Food Store. After being taken back to the Monroe City Jail police took a color photo of Pettioner. And days later Petitioner was told that the victim of the armed robbery had picked his picture as being the robber. Petitioner was advised that he was under arrest for armed robbery and Petitioner requested that an attorney be appointed him since Petitioner was unable to afford one. However, Petitioner's request was disregaurded. Petitioner was taken to the Ouachita Parish Jail where a lineup was held and again the victim picked Petitioner as the man that robbed her.

Subsequently, Petitioner was prosecuted and convicted. Petitioner has exhausted his remedies and now comes to this Honorable Court seeking relief.

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versus

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LEGAL PRINCIPLES:

Under our system of laws in these United States, even a thief is entitled to complain of an unconstitutional conviction if he is imprisoned as an armed robber.

No longer is a mere modicum of evidence on each element of the crime/statutory offence sufficient to convict. The some evidence rule as enunciated in Thompson v. Louisville, 362 U.S. 1960, has matured and evolved into the quantum and quallity reasonable doubt standard of In Re Winship, 397 U.S. 358 (197) and Jackson v. Virginia, 99 S. Ct. 2781 (1979).

A.

THE STATE'S EVIDENCE:

S-1 - Search warrant waiver, S-2-1 maroon pants, S-2-2 white knit shirt, S-3-1 to S-3-6 photographs, S-4-Linrup report, and the Testimony of the Victim-Witness.

AUTHORITY ON CLAIM 1.

Claim 1. - The Verdict contrary to the law and the evidence;

Petitioner submits that the evidence that the State produced and used was not sufficient to sustain a conviction beyond a reasonble doubt.

In the Federal courts and in most States, the judge, if he believes that the prosecution failed to make out a case, or that the law is in favor of the defendant, can take the case away from the jury by directing them to return a verdict of not guilty. However, the court has no power to direct a verdict of guilty, even when the incriminating evidence is conclusive and uncontradicted. The reason for this rule is that the court can not set aside a verdict of acquittal. See Underhill, Criminal

Evidence 433 (4th ed. 1935). The grounds for a motion for a new trial, although varied, are based upon errors that do not appear on the face of the records, it will be remembered, includes the recital of the legal steps that have been taken, such as the filing of the indictment, the arraignment and pleas, the holding of trial such as the selection of the jury. The admitted or excluded evidence, the questions that were or were not permitted to be asked, and the instructions to the jury that were given or refused. The Federal Rules of Criminal Procedure, rather than list the causes for a new trial provides that "The court may grant a new trial to defendant if required in the interest of Justice'. Rule 33. The power to grant a new trial, to a lesser degree than the power to direct a verdict of the jury. See Slovenko, Control over the jury verdict in Louisiana Criminal Law, 20 La. L. Rev. 657 (1960). The function of a trial judge in a motion for a new trial as in directing a verdict, is very important because he can in effect substitute his judgment for that of the jury on the question of innocent or guilt. Article 773 of the 1966 code, following the law of most States, provides for a directed verdict in jury trials, as well as allowing the court to enter a judgment of acquittal in judge tried cases, when after the close of the State's evidence or of all the evidence, the evidence is not sufficient to sustain a conviction. According to the majority of jurisdictions the trial judge the trial judge should not set aside a verdict of guilty as being "contrary to the law and evidence" when "some' evidence is presented upon which the jury could have reasonably based their conclusions.

Since the granting or refusing a motion for a new trial for insufficiency of evidence is a matter entirely within the discretion of the trial judge,; In the case of State v. Ricks,

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170 La. 507, 128 So. 293 (1930), the trial judge denied a motion for a new trial and the defendant on appeal argued to the court that the verdict was contrary to the evidence. The Supreme Court held that it can only pass on question of law and not on the guilt or innocence of the accused, and therefore could not review the trial judge's ruling on the motion for a new trial. Any other ruling would be contrary to the provisions which gives the Supreme Court appealate jurisdiction on questions of law alone. However, as the law requires that a conviction be based upon evidence beyond a reasonable doubt of the defendant's guilt, the question of whether there is sufficient evidence is a question of law. The court has ruled that the refusal of a trial judge to grant a motion for a new trial is appealable in cases where there is no evidence to support the conviction. If a trial judge overrules a motion for a new trial when no evidence at all is adduced to prove a necessary element of the crime, a question of law is presented which is appealable. As Chief Justice Oniell remarked in State v. Martinez, 201 La. 949, 953, 10 So. 2d 712, 713 (1942)...

> The line is drawn between an insufficiency of evidence and a total lack of evidence of fact or facts required to prove the guilt of the party accused.

In Re Winship, 397 U.S. 358 (1970), presupposes as an essential of the due process guaranteed by the 14th Amendment "that no person shall be made to suffer onus of a criminal conviction except upon sufficient proof defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every elemet of the offense.

In Jackson v. Virginia, 99 S. Ct. 2781 (1979), the court

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versus

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hol's that a State conviction must be affirmed if any evidence in the record supports the conviction. But rather must reach it's decision on the basis of whether the evidence was sufficient to justify a rational trier of factin finding guilt beyond a reasonable doubt.

In 1963, the Supreme Court again commented on the subject of denial of the due process by reason of lack of evidence in Garner v. Louisiana, 363 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207. Mr. Chief Justice Warren Speaking for the court stated:

> "In view we take of the cases we find it unnecessary to reach the broarder constitutional questions presented, and in accordance with our practice not to formulate a rule of Constitutional law broarder that is required by the precise facts presented in record for the devoid of evidentiary support as to render them under the due rocess clause of the 14th Amend., as in Thompson v. Louisiana, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d, our inquiry does not turn on a question of evidence to support a conviction, but on whether these convictions rest upon evidence which would support a finding that the Petitioner's acts caused a distubance of the peace. Id. at 251.

B.

ARGUMENT ON CLAIM II.

CLAIM VI. SUGGESTIVE IDENTIFICATION:

The State made Petitioner's pretrial photographic lineup tainted and suggestive in taking the victim photographs while

WILLIE JAMES PERSON

versus

FRANK C. BLACKBURN

Petitioner was already in police custody, further, the State took two (2) pictures of Petitioner to the victim and violated Petitioner's fundamental rights of the 14th Amend. under the due process clause.

AUTHORITIES:

IDENTIFICATION BY PHOTO BEFORE THE LINEUP IS SUGGESTIVE:

PEOPLE V. MacPHERSON, 2 Cal. 3d 109, 465 P. 2d 17, 84 Cal. Rptr. 129 (1970).

Imparting to the witness the belief of the police that "we have our man" can be impermissibly suggestive, for the witness is then likely to select the participant who looks "most like" the man. PEOPLE V. LOGAN,25 N.Y. 2d 184, 189, 250 N.E. 2d 454, 456, 303 N.Y.S. 2d 353, 356 (1969). In NEIL V. BIGGERS, 409 U.S. 188 (1972), the court further suggest that the primary due process question in identification settings concerns an identification is reliable and concluded that an impermissibly suggestive pretrial confrontation should not be excluded "a very substantial likelihood of irreparable misidentification."

In STOVALL V. DENNO, 388 U.S. 293 (1967) the court formed the due process test as follows:

> The confrontation... was so unnecessarily suggestive conducive to irreparable mistaken identification that defendant was denied due process of law... However, a claimed violation of due process of law in the conduct of a confrontation depend on the totality of the circumstances surrounding it. at 301-302.

ONCE A SUSPECT IS IN POLICE CUSTODY THERE IS NEVER ANY

United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK
TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS LA 70130

January 30, 1981

CASE RELATED INQUIRIES

COMM.	FTS
589-	682-
AL & GA	6192
FL	6131
LA & MS	6104
TX	3892

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 80-8368 - GIBSON vs. BLACKBURN
(D. C. No. CA 791714-M)

The following action has this day been taken in the above case:

( ) AN EXTENSION OF TIME has been granted to and including 80-6451

( ) for filing appellant's/petitioner's brief.

( ) for filing appellee's/respondent's brief.

( ) for filing reply brief.

( ) for filing petition for rehearing -

( )

( ) Motion to consolidate granted.

( ) Motion to supplement or correct the record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Joint motion as to time for filing briefs granted.

(X) Order enclosed has been entered.

( )

GILBERT F. GANUCHEAU Clerk

By Betty G. Martinez
Deputy Clerk

cc: Mr. Willie James Gibson
Mr. Walter Lee Perkins, Jr.
Mr. Robert H. Shemwell, Clerk

P. S. to Mr. Shemwell: Returned herewith are the record on appeal and four envelopes of state court papers. Please acknowledge receipt on the enclosed copy of this letter.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT A

U.S. COURT OF APPEALS
FILED
JAN 30 1981
GILBERT F. GANUCHEAU
CLERK

No. 80-8368

WILLIAM JAMES GIBSON,

Petitioner,

versus

FRANK C. BLACKBURN, Warden,

Respondent.

- - - - - - -

On Application for Certificate of Probable Cause and for Leave to Appeal in Forma Pauperis

- - - - - - -

O R D E R:

IT IS ORDERED that petitioner's pro se application for certificate of probable cause and for leave to appeal in forma pauperis is DENIED

UNITED STATES CIRCUIT JUDGE

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 11 1980
ROBERT H. SHEMWELL, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

WILLIAM JAMES GIBSON,
Petitioner

VS. CIVIL ACTION NO. 791714

FRANK C. BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY

MEMORANDUM RULING ON MOTION FOR
ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE

For reasons enumerated in a seven-page opinion dated November 10, 1980, this Court dismissed petitioner's application for a writ of habeas corpus. Petitioner, reiterating the same three reasons urged in his application for habeas corpus, requests that this court grant a certificate of probable cause.

Rule 22(b) of the Federal Rules of Appellate Procedure, outlines the responsibility of the district judge upon the filing of such an application. If, as here, an appeal has been taken, the district judge should either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The tests for granting a certificate of probable cause indicate that the standard requires something more than the absence of frivolity, and that the standard is a higher one than the "good faith" requirement. See discussions at 43 F.R.D. 343 and 50 F.R.D. 153.

The reasons asserted in our memorandum ruling denying the petition for habeas corpus are reiterated and assigned as our reasons for denying a certificate of probable cause. There is absolutely no merit to petitioner's contention that the verdict was contrary to the law and the evidence. The testimony of the victim of the armed robbery is explicit and unambiguous.

COPY SENT
DATE 12-11-80
BY _____
TO: Gibson
Perkins

There is no merit to petitioner's contention in regard to the out-of-court identification. This allegation is completely refuted by the record which contains the testimony of the police officers and the victim, to the effect that after the robbery the victim gave a good description of petitioner which enabled the officers to arrest him, and subsequently the victim was presented with six color photographs from which she immediately picked out the photograph of petitioner.

There remains the contention that Mr. Gibson was denied effective assistance of counsel. The state judge held a full and fair evidentiary hearing on this contention and concluded that petitioner's court appointed counsel did everything that was required of him to meet the standard of effectiveness for retained and/or appointed counsel. No useful purpose is to be served by a repetition of the details which are set forth in this court's memorandum ruling of November 10, 1980.

The motion for a certificate of probable cause is denied.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, on this the 11th day of December, 1980.

EDWIN F. HUNTER, JR.
UNITED STATES SENIOR DISTRICT JUDGE

WILLIE [illegible] GIBSON

VERSUS

FRANK C. BLACKBURN

People Vs Mattson, 51 Cal. 2d 777, [illegible], 336 P. 2d 937; People Vs Avilez, 56 Cal. App. 2d 289, 296, 134 P. 2d 849; Mitchell Vs United States, 104 U.S. App. D.C. 57, 259 F. 2d 787,788.

5.

Each of the above stated claims, individually and collectively, had deprived Petitioner of his Federally protected rights under the United States Constitution and has so severely prejudiced his cause before the trier of fact that the conviction by which Petitioner's liberty is abridged is a gross miscarriage of Justice.

6.

WHEREFORE, the premises considered, Petitioner asks the court for issuance of a certificate of probable cause to prosecute an appeal

Respectfully Submitted

Willie James Gibson
#80839 Spruce 2
Louisiana State Penitentiary
Angola, Louisiana 70712

U. S. DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
FILED
DEC 11 1980
ROBERT H. SHEMWELL, CLERK
BY [illegible] DEPUTY

O R D E R

It is hereby ordered that a certificate of probable cause be ~~denied~~ issued and is ~~denied~~ issued this 11th dayof December 19 80

[illegible]
Honorable Judge

(3)

See Reasons Assigned on Order.

COPY SENT
DATE 12-11-80
BY [illegible]
TO: Gibson